Supreme Court, U.S.
FILED
JAN 12 2009
OFFICE OF THE CLERK

No. 08-640

IN THE
Supreme Court of the United States

FEDERAL INSURANCE COMPANY, ET AL.,
Petitioners,

v.

KINGDOM OF SAUDI ARABIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS HRH CROWN PRINCE SULTAN BIN ABDULAZIZ AL-SAUD, HRH PRINCE NAIF BIN ABDULAZIZ AL-SAUD, HRH PRINCE SALMAN BIN ABDULAZIZ AL-SAUD, AND HRH PRINCE TURKI AL-FAISAL BIN ABDULAZIZ AL-SAUD

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
COLIN S. STRETCH
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for Respondent HRH Prince Turki Al-Faisal bin Abdulaziz Al Saud

JEFFREY A. LAMKEN
Counsel of Record
WILLIAM H. JEFFRESS
SARA E. KROPF
JAMIE S. KILBERG
ROBERT K. KRY
MARTIN V. TOTARO
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2400
(202) 639-7700
Counsel for Respondents HRH Crown Prince Sultan bin Abdulaziz al-Saud, HRH Prince Naif bin Abdulaziz al-Saud, and HRH Prince Salman bin Abdulaziz al-Saud

January 12, 2009

Respondents HRH Crown Prince Sultan bin Abdulaziz al-Saud, HRH Prince Naif bin Abdulaziz al-Saud, HRH Prince Salman bin Abdulaziz al-Saud, and HRH Prince Turki Al-Faisal bin Abdulaziz Al-Saud respectfully submit this supplemental brief pursuant to this Court's Rule 15.8 to advise the Court of the Fourth Circuit's recent decision in *Yousuf v. Samantar*, No. 07-1893, 2009 WL 40942 (4th Cir. Jan. 8, 2009). In that case, a panel of the Fourth Circuit held – as an alternative basis for decision – that "the FSIA does not apply to individuals." *Id.* at *1. Although the decision appears to diminish the consensus among courts of appeals that the FSIA applies to official-capacity suits against individuals, it provides no basis for this Court's review here.

First, *Yousuf* at most raises an academic issue concerning the *source* of sovereign immunity for individual officers; it raises no issue about whether immunity is available. As noted in the briefs in opposition, everyone agrees that individual officers are entitled to immunity for their official acts either under the FSIA or under the common law. Because common-law immunity is broader than the FSIA immunity the Second Circuit held to be available here, petitioners cannot proceed against the Princes even if they prevail on the question they seek to raise. *See* HRH Crown Prince Sultan et al. Opp. 22-24; HRH Prince Turki Opp. 25-26. The *Yousuf* court did not dispute that individual officers could claim common-law immunity, emphasizing that the defendant in that case remained "free to pursue on remand" his entitlement to "immunity . . . arising under pre-FSIA common law." 2009 WL 40942, at *11. And the concurrence in *Yousuf* underscored this point, observing that the panel's decision was "not [a] radical depar-

ture" from other authority because the decision was "in keeping with th[e] position" that "common law immunities" continue to apply. *Id.* (Duncan, J., concurring in part and concurring in the judgment).

For that reason, any disagreement in reasoning between *Yousuf* and the decision below lacks practical significance. What matters is *whether* officers are immune, not the *source* of their immunity. No court has ever suggested that the FSIA *eliminated* immunity for individual officers; nor has any court suggested that the common law would afford narrower immunity than the FSIA (which is hardly surprising because the FSIA codified common-law principles). Unless a dispute arises over the scope and availability of immunity, any conflict over the *source* of immunity is wholly academic.

Second, the decision in *Yousuf* is in any event unlikely to be the last word from the Fourth Circuit on the applicability of the FSIA to individuals. As an initial matter, it creates a direct conflict with that Court's prior decision in *Velasco v. Government of Indonesia*, 370 F.3d 392 (4th Cir. 2004), which held that the FSIA does provide immunity to government officials sued in their individual capacity.

The *Yousuf* panel purported to distinguish *Velasco* on the ground that *Velasco* addressed when "the acts of an individual operate to bind a foreign sovereign," not whether the FSIA applies to individuals. 2009 WL 40942, at *6-*7 (emphasis omitted). But that is incorrect. The plaintiff in *Velasco* sued the government of Indonesia and several officials "in their official capacities" for, *inter alia*, payment of a promissory note. 370 F.3d at 395-97. Following *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), and other cases, the *Velasco* court explained

that "[c]laims against the individual in [an] official capacity are the practical equivalent of claims against the foreign state." 370 F.3d at 399.

The court *then* addressed whether issuance of the promissory note constituted the commercial activity of a foreign state within the meaning of the FSIA's commercial activities exception (28 U.S.C. § 1605(a)(2)), such that the defendants (including the individual defendants) were not immune from suit. *See* 370 F.3d at 398. The court concluded that the promissory note was not issued pursuant to actual authority and that the commercial activities exception therefore did not apply. *See id.* at 401. The court thus held that "the District Court properly dismissed" all claims in the case, including the claims against "the individual Defendants . . . in their official capacities," because *all* defendants were "immune from suit under the FSIA." *Id.* at 402.

In light of that clear holding – which petitioners themselves have previously acknowledged, *see* Pet. 16 – the *Yousuf* panel's statement that *Velasco* did not address the issue is incorrect. That makes en banc review extraordinarily likely. The decision, moreover, is by its terms in conflict with "a majority of the courts," 2009 WL 40942, at *3, and its analysis is substantially incomplete even apart from its misreading of *Velasco*. The panel simply ignores, for example, the principle that an official-capacity suit is in every meaningful sense a suit against the "foreign state" itself and that the FSIA's use of "including" in the definition of "foreign state" means that the definition is illustrative, not exhaustive. *See* HRH Crown Prince Sultan et al. Opp. 13-14; HRH Prince Turki Opp. 24. The decision also fails to address Congress's recent amendment to the FSIA's terror-

ism exception. As the Second Circuit observed, that amendment "evince[s] congressional recognition that claims against individual officials of a foreign government must be brought within the confines of the FSIA." Pet. App. 21a. The *Yousuf* panel, however, did not acknowledge or address the current statutory language and instead appears to rest on an outdated version of the statute, rendering the decision subject to revisiting on that ground alone.

Given those many defects, and given that the analysis of whether the FSIA affords immunity to individual officers was unnecessary to the judgment in that case,* *Yousuf* has a dubious future even in the Fourth Circuit. Indeed, because *Yousuf*'s contrary holding came after *Velasco*, future Fourth Circuit panels will be required to follow *Velasco*, not *Yousuf*, even absent en banc review. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) ("[A]s to conflicts between panel opinions, application of the basic rule that one panel cannot overrule another requires a panel to follow the earlier of the conflicting opinions."). *Yousuf* thus does not support petitioners' request for review.

* * * * *

* After addressing that issue, *Yousuf* went on to hold that, regardless of whether FSIA immunity is available to individual officers generally, it was unavailable in that case because the defendant was a former rather than current government official. *See* 2009 WL 40942, at *10-*11.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
COLIN S. STRETCH
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for Respondent
HRH Prince Turki Al-Faisal
bin Abdulaziz Al-Saud

JEFFREY A. LAMKEN
Counsel of Record
WILLIAM H. JEFFRESS
SARA E. KROPF
JAMIE S. KILBERG
ROBERT K. KRY
MARTIN V. TOTARO
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2400
(202) 639-7700
Counsel for Respondents
HRH Crown Prince Sultan bin
Abdulaziz al-Saud, HRH Prince
Naif bin Abdulaziz al-Saud,
and HRH Prince Salman bin
Abdulaziz al-Saud

January 12, 2009